United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-1507

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To be argued by
RICHARD A. GREENBERG

UNITED STATES OF AMERICA,

Appellee,

-against-

JAMES C. THWEATT,

Appellant.

Docket No. 77-1507

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

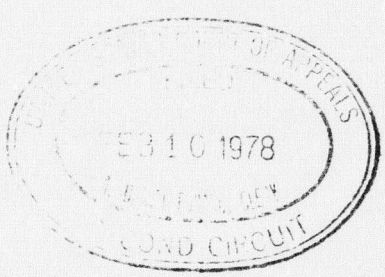

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TABLE OF CONTENTS

Table of Cases and Other Authorities ii

Questions Presented 1

Statement Pursuant to Rule 28(a)(3) 2

Preliminary Statement 2

Statement of Facts 2

A. The Government's Case 4

1. LEAA's method of operation generally and in this case 4

2. The government's proof of appellant's specific misconduct.. 9

3. The "Similar Acts" evidence 12

B. The Defense Case 12

C. Jury Deliberations, The Court's Additional Instructions, and Sentence 14

Argument

I. The trial court gave an unbalanced charge depriving appellant of a fair trial when, in response to the jury's successive questions to hear again "any part of the charge relating to the jury's responsibility in considering the defendant's intent" and whether "very good intent and purpose" negated criminal intent, it refused defense requests to re-charge on character evidence and re-charged instead only on prosecution-oriented matters. 16

II. The trial court committed reversible error in admitting into evidence, over objection, government exhibit 56 when there was an insuffiecient foundation to believe that appellant had ever received or seen the document. 25

III. The imposition of a more severe sentence because appellant failed to demonstrate "contrition" for crimes of which he maintained his innocence impermissibly placed a price tag on his Fifth Amendment privilege not to incriminate himself, requiring his sentence to be vacated as a matter of due process or in the exercise of this court's supervisory power..... 30

IV. The false documents appellant was convicted of having filed with CJCC were not made in a matter within the jurisdiction of a federal agency within the meaning of 18 U.S.C. §1001 38

V. The trial court abused its descretion in refusing counsel's request for a one week continuance to prepare a defense when the trial would have commenced within two months of appellant's arraignment and counsel had been retained less than two weeks earlier..... 44

Conclusion 45

TABLE OF CASES

Barnes v. United States,412 U.S.837(1973)..... 28

Bollenbach v. United States,326 U.S.607(1946)..... 17

Bordenkircher v. Hayes,__U.S.__,46 U.S.L.W.4089 ... 36,37

Ely v. Velde,451 F.2d 1130(4thCir.1971)..... 40

Frank v. United States,347 F.2d 486 (D.C.Cir.), cert.dism. 382 U.S.923(1965)..... 31

Gavino v. MacMahon,499 F.2d 1191(2d Cir.1974)..... 45

Gila Valley,Globe & Northern R.Co. v. Hall, 232 U.S.94(1914) 26

Gollaher v. United States,419 F.2d 520 (9th Cir.) cert.den.396 U.S.960(1969)..... 31,34

Gore v. United States,357 U.S.386(1958)..... 30

Kotteakos v. United States,328 U.S.750(1946)..... 25

Lowe v. United States,141 F.2d 1005(5th Cir.1944).. 39

Mills v. United States,281 F.2d 736(4th Cir.1960).. 31,32

Perez v. United States,297 F.2d 12(5th Cir.1961)... 20,22

Poteet v. Fauver,517 F.2d 393(3d Cir.1975)..... 34,35,37

Scott v. United States,419 F.2d 264(D.C.Cir.1969).. 31,34,35,36,37

Sherbert v. Verner,374 U.S.398(1963)..... 36

Thomas v. United States,368 F.2d 941(5th Cir.1966). 31,34,37

Turner v. United States,396 U.S.398(1970)..... 28

United States v. Adler,380 F.2d 917(2d Cir.) cert.den.389 U.S.1006(1967)..... 39

United States v. Arlen,252 F.2d 491(2d Cir.1958)... 45,46,47

United States v. Bass,404 U.S.336(1971)..... 41

United States v. Bland,299 F.2d 105(5th Cir.1962).. 20,22

United States v. Brecht,540 F.2d 45(2d Cir.1976)... 38

United States v. Candella,487 F.2d 1223(2d Cir.) cert.den.415 U.S.977(1974)..... 39,41,43

United States v. Carter,491 F.2d 625(5th Cir.1974). 20,22

United States v. D'Amato,507 F.2d 26(2d Cir.1974).. 38,39

United States v. Floyd,496 F.2d 982(2d Cir.)
cert.den. 419 U.S.1069(1974)..... 36

United States v. Gentile,525 F.2d 252(2d Cir.)
cert.den.425 U.S 903(1976) 19,23

United States v. Gilliland,312 U.S.86(1941) 39

United States v. Hendrix,505 F.2d 1233(2d Cir.)
cert.den.423 U.S.897(1975)..... 30,36

United States v. Isaacs,493 F.2d 1124(7th Cir.)
cert.den.417U.S.476(1974)..... 39

United States v. Knohl,379 F.2d 427 (2d Cir.1967).. 45

United States v. McCarthy,473 F.2d 300(2d Cir.1972) 23,25

United States v. McCue,301 F.2d 452(2d Cir.)
cert.den.370 U.S.939(1962)..... 38

United States v. Mixon,374 F.2d 20 (6th Cir.1967).. 21

United States v. Robin,553 F.2d 8(2d Cir.1977)..... 37

United States v. Rogers,504 F.2d 1079(5th Cir.1974).34,36

United States v. Rosenberg,195 F.2d 583(2d Cir.)
cert.den.344 U.S.838(1952)..... 19

United States v. Southerland,428 F.2d 1152 (5th
Cir.1970)..... 17

United States v. Vermeulen,436 F.2d 72 (2d.Cir)
cert.den.402 U.S.911(1971)..... 35

United States v. Wilson,488 F.2d 1231(2d Cir.)
rev'd 421 U.S.309(1975)..... 31,32

OTHER AUTHORITIES

American Bar Associations, Project on Standards for Criminal Justice, Trial by Jury (Approved Draft 1968)... 17,23

Federal Rules of Evidence (Federal Judicial Center,1975)... 19

LEAA Guide Manual,"Financial Management for Planning and Action Grants (1973)..... 42

McCormick, EVIDENCE (2d ed. 1972) 1

McCormick, EVIDENCE (1954 ed.)..... 18

1968 U.S. Congressional & Administrative News..... 40

United States Constitution, Fifth Amendment..... 30

I Weinstein and Berger, EVIDENCE..... 26

I Wigmore, EVIDENCE..... 18

STATUTES INVOLVED

18 U.S.C. §1001

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both

New York Penal Law §175.35
Offering a false instrument for filing in the first degree

A person is guilty of filing a false instrument for filing in the first degree when, knowing that a written instrument contains a false statement or false information, and with intent to defraud the state or any political subdivision thereof, he offers or presents it to a public office or public servant with the knowledge or belief that it will be filed with, registered or recorded in or otherwise become a part of the records of such public office or public servant.

offering a false instrument for filing in the first degree is a class E Felony.

Omnibus Crime Control and Safe Streets Act of 1968, P.L.90-351, Title I, 42 U.S.C. § 3701 et seq

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QUESTIONS PRESENTED

1. Whether the trial court gave an unbalanced charge depriving appellant of a fair trial when, in response to the jury's successive questions to hear again "any part of the charge relating to the jury's responsibility in considering the defendant's intent" and whether "very good intent and purpose" negated criminal intent, it refused defense requests to recharge on character evidence and recharged instead only on prosecution-oriented matters.

2. Whether the trial court committed reversible error in admitting into evidence, over objection, government exhibit 56 when there was an insufficient foundation to believe that appellant had ever received or seen the document.

3. Whether the imposition of a more severe sentence because appellant failed to demonstrate "contrition" for crimes of which he maintained his innocence impermissibly placed a price tag on his

Fifth Amendment privilege not to incriminate himself, requiring his sentence to be vacated as a matter of due process or in the exercise of this Court's supervisory power.

4. Whether the false documents appellant was convicted of having filed with CJCC were made in a matter within the jurisdiction of a federal agency within the meaning of 18 U.S.C. § 1001.

5. Whether the trial court abused its discretion in refusing counsel's request for a one week continuance to prepare a defense when the trial would have commenced within two months of appellant's arraignment and counsel had been retained less than two weeks earlier.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable Robert J. Ward) entered on November 22, 1977, after a jury trial, convicting appellant James C. Thweatt of nineteen counts of filing false documents in a matter within the jurisdiction of a federal agency, in violation of 18 U.S.C. §§1001 and 2. Appellant was sentenced to concurrent two year terms of imprisonment on all counts, and was permitted to remain free on $30,000 personal recognizance bond secured by $1000 cash deposit pending appeal.

STATEMENT OF FACTS

Appellant James C. Thweatt was indicted on July 28, 1977, in the Southern District of New York in a thirty-eight count indictment*

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* The indictment (77 Crim. 0553) is B to appellant's separate appendix.

charging him with having knowingly submitted false statements and documents in a matter within the jurisdiction of the Law Enforcement Assistance Administration of the United States Department of Justice (herein "LEAA") in violation of 18 U.S.C.§§1001 and 2, and of having embezzled LEAA funds in excess of $8900 in violation of 18 U.S.C. §§641 and 2. Counts 1-19 of the indictment alleged that appellant filed, or aided and abetted in filing, nineteen monthly reports covering a period from June, 1972 to January, 1974 in which he falsely overstated the amount of rent, and provided false documentation to support it, that an organization called Legal Propinquity (hereinafter "Legal Pro"), of which he was the director, was paying on its storefront office. Count 37 of the indictment, which paralleled Counts 1-19, alleged that appellant embezzled the overstated amount of rent to the extent of $8800 of LEAA funds. Counts 20-36 alleged that in seventeen of those monthly reports, appellant also falsely overstated, concealed or covered up expenditures for improper or unauthorized uses. Count 38, which paralleled Counts 20-36, alleged that he embezzled the concealed, improper expenditures in an amount in excess of $100 of LEAA funds. Arraigned on August 4, 1977, appellant's trial before the Honorable Robert J. Ward and a jury commenced on September 26, 1977.* After three weeks of proceedings,

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* Before jury selection commenced on September 26th, defense counsel, Mr. Bernstein, informed the court he was not ready for trial and asked for a continuance of one week (11), until October 3rd, the first and only such request counsel had made. At the first pre-trial conference on August 22nd, three weeks after his arraignment, appellant had told the court he was attempting to retain Mr. Bernstein, but that counsel was away on vacation and was not expected to return until early in September. At a second pre-trial conference on September 15th, eleven days before the date set for trial, Mr. Bernstein appeared for appellant and was apparently retained at approximately that time. In support of his application for the one week continuance, counsel stated, and the court agreed, that he had been "diligently" preparing the case
(continued on page 4)

appellant was convicted on October 20, 1977 only on Counts 1-19. On appellant's motion, a mistrial was declared by the Court as to Counts 20-38 when the jury was unable to reach agreement on those counts (2454).* On November 22, 1977, appellant was sentenced to concurrent two year terms of imprisonment on all counts.

A. The Government's Case

The government's proof in support of the indictment can be broken down into three component parts: (1) LEAA's method of operation generally and in this case; (2) appellant's specific misconduct under the counts of the indictment; and (3) appellant's alleged involvement in a similar "scheme", admitted as "similar acts" evidence, involving a purely local program in which there was concededly no federal involvement.

1. LEAA's method of operation generally and in this case

Based primarily on the testimony of three witnesses -- Rudolph Clarence, chief fiscal officer for the New York City Criminal Justice Coordinating Council (hereinafter CJCC)(72-290); Herbert Friedman, chief fiscal officer of the New York State Office of Planning and Program Assistance, Division of Criminal Justice Services (hereinafter

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for trial, but simply needed more time to do so in view of the amount of documentary evidence he was required to review in the office of the U.S. Attorney and the complexity of the issues. Additionally, counsel stated that he had not yet had time to interview five named and important witnesses, three of whom resided in other states; had not yet had time to examine in depth the monthly reports which formed the basis of the indictment; and had not had time to consult a handwriting expert or an accountant to prepare a rebuttal to the anticipated experts the government intended to call at trial. The court nevertheless denied the application and trial commenced (2-32).

* Numbers in parentheses refer to pagination in the trial transcript. The court asked for the jury's guidance on whether they wanted to deliberate further on counts 20-38 and, upon learning that a majority did not, the court dismissed them and declared a mistrial.

"DCJS")(291-348); and Dominick Zazzaro, LEAA's program manager for New York State (359-384) -- much of whose testimony was largely duplicative, the following administrative schemework was depicted at trial.

Created by the Omnibus Crime Control and Safe Streets Act of 1968, LEAA was established to provide federal funds and technical assistance to State and local units of government for the purpose of improving their law enforcement and criminal justice systems. Upon approving a state's comprehensive crime control plan, LEAA awards a block grant to a state to cover general programmatic categories, such as providing assistance to juveniles, contained in the plan. The State, on its own authority, then funds individual projects in conformance with its plan. The states are required to report to LEAA on the use of LEAA funds. In 1972 and 1973, LEAA awarded the State or New York a total of approximately $61.5 million (GX 70 and 71).* LEAA also requires that programs receiving LEAA funds must have some portion of their budgets funded with non-federal money called "Match" grants or funds.

DCJS and CJCC are, respectively, the State and City agencies in New York that implement LEAA's program by distributing LEAA funds to, and supervising the use of those funds by, local project recipients called sub-grantees or contractors. Upon approving an application for funding by a New York City sub-grantee, CJCC transmits the application to DCJS for ultimate approval. If approved by DCJS, a contract is entered into between DCJS and CJCC in the form of a "grant award," and CJCC in turn enters into a subcontract with the sub-grantee-recipient incorporating the contract between DCJS and CJCC. CJCC requires the subgrantee to make monthly reports, with underlying

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* "GX" refers to government exhibits in evidence at trial; "CtX" refers to court exhibits; and "DX" refers to defense exhibits.

documentation, detailing the use made of both LEAA and non-LEAA funds. CJCC periodically reimburses the subgrantee for budgetary expenditures, and in turn requests reimbursement from DCJS which draws down from the LEAA block grant set aside for its operation. The actual payments are made by the comptrollers of the City and the State. Copies of the monthly reports to CJCC are transmitted to DCJS, but not to LEAA, although DCJS does transmit to LEAA from time to time general reports on the total amount of LEAA funds allocated to local projects (GX101-103,103B,103C,104-107,115-116).

As testified to by Clarence and another government witness, Harold Oostdyk (412-523), in mid-1971 a not-for-profit New York corporation called the Hollow Organization (hereinafter "Hollow"), of which Oostdyk was the director, submitted a funding proposal to CJCC for Legal Pro, a diversionary project designed to provide counselling for East Harlem youths who became involved with the criminal law, with a storefront office at 1686 Madison Avenue (GX25-26). In late 1971, CJCC notified Oostdyk that the proposal had been approved by DCJS (GX 54).

Oostdyk testified that while appellant was an employee of Hollow since 1971, he had only been minimally involved in the initial funding negotiations with CJCC for Legal Pro, and it was Oostdyk who had carried the major burden (416,441). By February, 1972, Oostdyk had largely phased himself out of the negotiations for Legal Pro, at which time appellant and another Hollow employee, Sidney Mann, picked up the responsibility (441-442). Oostdyk testified that until mid-1972, Mann was the director of Legal Pro and appellant was its fiscal officer (419,429-431). On February 29, 1972, however, a letter was sent to appellant as "Project Director" of Legal Pro by Bert Hoff, CJCC's program manager, together with a copy of the proposed agreement

between CJCC and DCJS covering Legal Pro. The letter requested appellant to review it and, if he approved, to sign the letter below and return it to Hoff. The letter bears the signature, over the word "approved", of "James C. Thweatt" with tne title, "Director, Legal Propinquity," and is dated "2/29/72" (GX27). A government handwriting expert testified that in his opinion the signature was appellant's(1555).

In March, 1972, a "Grant Award" was entered into between DCJS and CJCC covering Hollow's Legal Pro project, providing $71,272 in LEAA funds for Legal Pro's operation over a period of nineteen months, from March 15, 1972 to December 14, 1973, and requiring CJCC or Hollow to obtain $63,375 in non-federal funds (GX28).** The attached budget of the Grant Award indicates a total rental budget for Legal Pro over the life of the grant of $9000, or approximately $500 a month, to be reimbursed with LEAA funds (251). Also in March, 1972, CJCC in turn entered into a subcontract with Hollow, signed by Oostdyk, for the actual implementation of Legal Pro's operation (GX30).** The Grant Award (GX28) was attached to and made part of the subcontract.Clarence testified that GX28 and 30 comprised the entire agreement governing Legal Pro's operation (283).

In March or April, 1972, Clarence had a 1 1/2-2 hour interview with appellant at the CJCC office to go over the documents and Legal Pro's fiscal obligation. Clarence viewed appellant as the project director at this time (115). Clarence remembered having instructed

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* The Grant Award and its "Attachment A" (GX28) are E to appellant's separate appendix. Underlinings or handwritten markings were apparently made by trial counsel and not by appellate counsel.

** Appellate counsel's copy ot GX30 is too light to allow for reproduction and inclusion in the separate appendix.

appellant five years earlier on Legal Pro's reporting requirements, including the need to document monthly rental payments with receipts or checks, not to deviate from the budget without approval, to itemize all expenditures, and to request reimbursement only for what was actually spent even if it was less than the budget allowed (121-124). Clarence said that appellant agreed to comply with those requirements (124-125). Clarence admitted, however, that most of his discussion with appellant focused on "Attachment A" to the Grant Award, and that he either spent no time or very little time explaining the "Terms and Conditions" of the Grant Award itself (246). Clarence did so based on his belief that the "Terms and Conditions" of Grant Award "relate more to me, meaning the City of New York," rather than to Legal Pro (247-248).

In May, 1972, after Oostdyk no longer had any involvement with Legal Pro, a letter was sent to him by CJCC's director, addressed to Hollow's West 92nd Street office (GX56).* The grant award was apparently enclosed with the letter, for the letter stated, "Enclosed is a copy of the fully executed grant award C-60372 /between DCJS and CJCC/." The letter also directed that, in the administration of the grant award, "all City regulations governing the expenditures of funds will be strictly adhered to /and/ the provisions of the New York State grant award...will be complied witn in all cases." Oostdyk had no recollection of receiving the letter or of giving it to appellant. Although he did have a practice at that time of referring all Legal Pro correspondance to appellant, either by giving it to him directly or by giving it to anyone of three other persons -- Gladys

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* GX56 is "D" in appellant's separate appendix.

Battles, Carl Hart, or Sidney Mann -- who were associated with Legal Pro, with the direction to pass it on to appellant, he could not say whether such direction was followed in this case. After several voir dires and extensive argument, the court admitted GX56 into evidence over a defense objection based on the court's view that there was sufficient basis to believe that appellant "in fact" had received the letter (467-483,511). In summation, the prosecutor relied on GX56 in arguing that appellant had knowledge of the reporting requirements to which he was subject (2255) and defense counsel, in his summation, went some lengths in urging the jury to discount it (2282-84).

By the summer of 1972, Legal Pro's administration was taken over by Streetworkers, Inc. (hereinafter "SWI"), formerly an arm of Hollow, but by then separately incorporated as a New York non-profit corporation. Appellant was also an officer of SWI.

It was never contended by the government at trial that Legal Pro was a sham organization created for corrupt purposes. On the contrary, the government conceded that Legal Pro "was fundamentally a good and worthwhile program, and the Government is not here to contest [that]" (55).

2. The government's proof of appellant's specific misconduct

The government introduced into evidence twenty monthly reports purporting to account for Legal Pro's monthly expenditures (GX1-20), Reports 2-20 tracking the first nineteen counts of the indictment. Reports 2-14, covering a period from June, 1972 through July, 1973, reflected a monthly rent expenditure on the Legal Pro storefront at 1686 Madison Avenue of $325.*Reports 15-20,covering a period of August,1973

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* An example of the relevant portions of one of those reports is found as "F" to appellant's separate appendix.

through January, 1974, reflected a monthly rental of $800. The rent expenditures set forth in Reports 2 through 5, covering the period June, 1972 through October, 1972, were substantiated by checks drawn on Hollow's bank account and made payable to SWI (GX2x-5x). The rent expenditures set forth in Reports 6 through 20 were documented by rent receipts either from a management company called "One-Twenty-One Management Corp."(hereinafter "121"), whose president was appellant's sister, Iris Rucker, or by agents of 121 (GX6x-20 x).

The government offered evidence through the testimony and ledger books of the true owner of and real estate agents for the Legal Pro storefront that the actual rent was never more than $125 permonth, and that only four months rent, totalling $500, was actually paid during the nineteen months covered by the indictment (Zeigler,871-919; Chan, 928-943; Brooks, 1045-1071; Perlson, 1074-1085).

The government offered further proof through its handwriting expert that the signature "James C. Thweatt" certifying the accuracy and regularity of GX1-14 on the front of each of those reports was in fact that of appellant (1549-1550). The same witness also testified that in his opinion the underlying rent documentation for Reports 2-5, 7-10, 12-15, and 17-20 (GX2x-5x,7x-10x,12x-15x,17x-20x) were in appellant's handwriting (1550-1551), even though some of the documentation (e.g.,GX10x and 13x) bore the purported signature of others (1551-1553).

While the handwriting expert testified that Reports 15-20 (GX15-20) did not bear appellant's signature (1616), appellant's cousin, Walter Watson, testifying for the government under a grant of immunity (539), admitted having signed appellant's name to those reports (561-571), and was "certain" that appellant was "aware" that he had done do (562-563). Watson testified that he had been hired by

appellant in July, 1973 to prepare monthly fiscal reports for another of SWI's programs involving purely local funds from the New York City Addiction Services Agency (hereinafter ASA), and later prepared Legal Pro's reports (543-546). Watson conceded, however, that appellant had never told him how to fill out Legal Pro's reports nor to omit anything from the reports (737-748). Moreover, Watson admitted having first lied to the grand jury during his appearance in this case (724-728); admitted "double billing" ASA and CJCC for the same expenditures which he did on his own without appellant having told him to (799-800); and admitted that his expenses while in New York to testify were paid for by the government (717-719). Watson maintained, however, that he had been "hesitant" to tell the truth in the grand jury "[b]ecause I thought it was in my best interest...[and] because I thought it could help Jim" (850). Subsequently, Watson reappeared before the grand jury and changed his testimony purportedly to give more truthful answers (853-854). He also claimed that in June, 1977, before his first grand jury appearance, appellant told him that "you don't have to remember things that you don't know anything about" (701), which was admitted as evidence of appellant's consciousness of guilt.

As further evidence of consciousness of guilt, the government was permitted to introduce the testimony of its handwriting expert to the effect that, in his opinion, appellant had attempted to disguise his handwriting exemplars given to an FBI agent (GX600A,600B; 1608). The government also introduced into evidence as a false exculpatory statement a transcript of appellant's testimony before a New York City Department of Investigations hearing on June 26, 1974, during which appellant asnwered evasively concerning his relationship

with his sister, Iris Rucker (GX640,1506-1528). The government argued that he had done so to conceal an alleged scheme by which appellant laundered Legal Pro funds through 121, a corporation he controlled through his sister.

3. The "Similar Acts" evidence

Finally, over objection, the government introduced extensive "similar acts" evidence purportedly showing appellant's involvement during the same period in a scheme to defraud ASA by falsely overstating the amount of rent paid for an ASA-funded program administered by SWI. Rent payment of at first $800 a month, and later $1400 a month, were claimed on space in a fire-damaged building at 161 East 121st Street owned by SWI and managed by 121. The government contended that 121 provided virtually no legitimate management service, but instead acted only as a conduit to launder ASA funds for appellant's personal use.

The "similar acts" evidence consisted of more than 150 pages of testimony (e.g., Watson, 589-635; Russo, 1085-1118; Phillips, 1137-1196,1283-1299), and approximately 43 documentary exhibits (GX204,205, 246-248,259,475,476A-L,476AA-LL,476I-O,477,477A,477B,478A,484,508). On occasion, the court voiced impatience with the length of the government's case, due in part to the "similar acts" evidence (1085,1195).

B. The Defense Case

Appellant's defense was lack of knowledge and criminal intent. Central to the defense was the testimony of ten character witnesses from many different walks of life who attested to appellant's previous good reputation for honesty and truthfulness (1795-1835). Their testimony and other evidence at trial (e.g. 1510) reflected the fact that appellant was a 1966 graduate of Syracuse University, where he had been a member of the football team; a 1968 graduate of that Uni-

versity's School of Public Administration; and a former employee of Edwards and Hanley, a brokerage firm, until he joined Hollow in 1970 or 1971, where he was initially responsible for administering Hollow's Urban Prep program (487-491). In his summation, defense counsel tied the character testimony to the question of intent and reasonable doubt, arguing at some length that

> You have to weigh the character of the defendant when assessing the intent with which any of the things I talked about in this particular case.
>
> Was there or does Mr. Thweatt appear to have the kind of character that would convince you beyond a reasonable doubt ...that what was done was done with criminal intent (2297-2298).

During its charge on character evidence, the court mentioned once that "[e]vidence of good character may in itself create a reasonable doubt where without such evidence no reasonable doubt would have existed" (2357).*

In further support of his defense that appellant lacked knowledge and criminal intent, Sidney Mann testified that in early 1972, he and appellant met with Bert Hoff, CJCC's program manager. Mann told Hoff that the Legal Pro storefront needed extensive rennovations and repairs, a fact that was corroborated by the government's witness, Carl Hart (1366-67), to which Hoff responded that CJCC could not provide any substantial amount of funds for rennovations. Hoff then suggested that since Legal Pro was not expending on rent the maximum amount budgeted, they should "maximize the rent allocation within the budget" (1887-1888).** A similar conversation took place in

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* The court's charge is found as "C" to appellate's separate appendix.

** Hoff did not testify at trial, but was one of the out of state witnesses that defense counsel said he needed time to interview in asking for a one week continuance (3).

appellant's presence with Ruby Wright, another program manager for CJCC, during the summer of 1973. When informed by Mann of Legal Pro's need for repairs and rennovations on its store front, Wright said to "get the best lease that you can for the building and also to maximize the rent"(1896-1897). There was further evidence presented by the defense that SWI retained an architect, who surveyed the buildings at 161 East 121st. Street and on Madison Avenue for the purpose of making rennovations (2001-2019).

On cross-examination of the government's witness, Clarence, he acknowledged that while he reviewed Legal Pro's monthly reports, he never questioned the rent payments, even when they jumped to $800 a month, claiming it was "a goof" on his part (254-256). Based on this evidence, counsel argued in summation that appellant believed that CJCC had authorized him to expend money for rennovations that was actually allocated for rent, and that CJCC was aware he was doing so (2290-2291).

C. Jury Deliberations, The Court's Additional Instructions, and Sentence

At 3:45 P.M. on October 19, 1977, after the court's charge, the jury retired to deliberate (2368). During the course of their deliberations, the jury submitted eight separate requests for further instructions on matters of law or evidence (Ct.X2-10,2370,2373,2382,2387, 2391,2416,2423,2431). On the morning of October 20th, the jury returned with a request to hear again "any part of the charge relating to the jury's responsibility in considering the defendant's intent (relating to Counts 1-19)"(2391,Ct.X6). Later in the afternoon, the jury asked

> "If a person has a very good intent and purpose, does this intent and purpose make lying to a government

> agency not a crime? Does this very good intent and purpose mean that this individual had no criminal intent when he or she lied to a government agency? (2416,Ct.X7)

In response to both requests, defense counsel asked the court to recharge on character evidence, which the court refused to do, recharging instead, over objection, on such matters requested by the government as false exculpatory statements, consciousness of guilt, "similar act" evidence, and the purposes of 18 U.S.C. §1001, concluding with the remark that "the law recognizes no excuses or justification for a false...statement wilfully and intentionally made to [a government agency]"(2409-135 2422-23). At approximately 7:30 P.M.on October 20th, the jury indicated they had arrived at a guilty verdict on counts 1-19 (2435).

On November 22,1977,appellant appeared before Judge Ward for sentencing.* Upon determining that appellant had shown "a lack of contrition," the court felt "require[d]" to sentence him "accordingly," and imposed concurrent two year terms of imprisonment (S.25).**

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* During the month of January, 1978, with Judge Ward's permission, appellate counsel read the Pre-Sentence Report in offices of the United States Department of Probation for the Southern District. The quoted portions of the Pre-Sentence Report in POINT III, infra, are derived from counsel's inspection of that report.

** "S" refers to pagination in the Sentencing Minutes.

ARGUMENT

POINT I

THE TRIAL COURT GAVE AN UNBALANCED CHARGE DEPRIVING APPELLANT OF A FAIR TRIAL WHEN, IN RESPONSE TO THE JURY'S SUCCESSIVE QUESTIONS TO HEAR AGAIN "ANY PART OF THE CHARGE RELATING TO THE JURY'S RESPONSIBILITY IN CONSIDERING THE DEFENDANT'S INTENT" AND WHETHER "VERY GOOD INTENT AND PURPOSE" NEGATED CRIMINAL INTENT, IT REFUSED DEFENSE REQUESTS TO RE-CHARGE ON CHARACTER EVIDENCE AND RE-CHARGED INSTEAD ONLY ON PROSECUTION-ORIENTED MATTERS.

Appellant's character evidence was central to his defense that he lacked criminal intent. He not only introduced the testimony of ten character witnesses who attested to his previous good reputation for honesty and truthfulness, but he expressly and properly tied this testimony to the question of intent by arguing to the jury in summation that "you have to weigh the character of the defendant when assessing [his] intent..." (2298). Thus, it would have been entirely appropriate to recharge the jury on the effect they might give character evidence* when they returned on successive occasions during their lengthy deliberations to request "any part of the charge relating to the jury's responsibility in considering the defendant's intent" and to ask whether "very good intent and purpose" negated criminal intent.

The court, however, improperly denied both requests because, in the court's too narrow view of the jury's requests, those requests were insufficient to summon the character evidence charge from the pidgeonhole of "reasonable doubt" to which the court had

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* The court mentioned once during its lengthy charge that "[e]vidence of good character may in itself create a reasonable doubt where without such evidence no reasonable doubt would have existed" (2357, App.C).

needlessly consigned it. Moreover, the court compounded its error by recharging instead, over a defense objection, on a welter of prosecution-oriented matters. The predictable result was an unbalanced charge to the jury which shortly culminated in a guilty verdict. In a case as close as this one, where, among other things, the length and nature of the jury's deliberations demonstrated that the jurors, or even one of them, were experiencing great difficulty in reaching a verdict, the court's unbalanced charge cannot be said to have been harmless.

Whether or not a trial court has the duty to answer a jury's proper request for fu ther instruction on a point of law [see, Bollenbach v. United States, 326 U.S. 607, 612-613 (1946); A. B. A.'s Project on Standards for Criminal Justice, Trial by Jury (Approved Draft 1968) (hereinafter "A. B. A.'s standards"), § 5.3, and Commentary thereto], it seems difficult to quarrel with the proposition that "[i]n giving additional instructions to a jury -- particularly in response to inquiries from the jury -- the court should be especially careful not to give an unbalanced charge." United States v. Southerland, 428 F. 2d 1152, 1157 (5th Cir. 1970). No doubt this need to be "especially careful" stems in large part from the fact that "the judge's last word is apt to be the decisive word." Bollenbach v. United States, supra. So, here, as in Bollenbach, "precisely because it was [close to] a last minute instruction the duty of special care was indicated in replying to a written request for further light on a vital issue by a jury...after they had been out seven hours." Ibid.*

* Here, the jury had been out for more than nine hours before returning to ask the first of the above-mentioned questions, having begun to deliberate at 3:45 P.M. on October 19th (2308), retiring for the night at 10:27 P.M. (2384), resuming deliberation at 9:30 A.M. on October 20th (2387), and returning to hear the answer to that question at 11:50 A.M. (2397).

In this case, the court eschewed its "duty of special care" and proceeded down the forbidden road of imbalance by refusing to recognize that the jury's request for "any part of the charge relating to [its] responsibility in considering the defendant's intent" properly encompassed a re-charge on character evidence. Defense counsel had heavily emphasized in his summation that the character evidence was intimately linked with the element of criminal intent (e.g., "...does Mr. Thweatt appear to have the kind of character that would convince you beyond a reasonable doubt... that what was done was done with criminal intent?") (2298), and counsel was on firm legal ground in so arguing. As the treatise writers have recognized, "so far as in criminal cases the criminal intent remains in issue, the good character of the defendant may be regarded as always relevant to disprove it." I Wigmore, EVIDENCE (3d. ed.), §56, pp 453-454; see also, McCormick, EVIDENCE (1954 ed.), §§153,155,158, pp 324, 334.

Thus, the court here took a needlessly and improperly narrow view of the jury's request for "any part of the charge" bearing on their responsibility to determine intent, which by its own terms called naturally for a recharge on character evidence. Similarly, the court took a parsimonious view of the very nature of the character charge itself, consigning it only to the Procrustean bed of "reasonable doubt" when it fit just as easily, and perhaps more so under the facts of this case, into a category relevant to criminal intent. As defense counsel correctly pointed out to the court, character evidence "shows lack of criminal intent, not simply reasonable doubt. Reasonable doubt is the ultimate question in a jury trial. And, of course, subsumed within that is the entire question of intent"(2396).

That the character evidence charge was pertinent to the jury's initial request is further demonstrated by what the court chose to read in its supplemental instructions. For example, it told the jury that, in considering the question of intent,

> you consider who the person is, what the circumstances are, the level, so far as you know it, of the person's intellegence, education and sophistication...(2407).

The similarity between this language bearing on intent and that contained in the character evidence charge is a strong indication of the close relationship between intent and character, notwithstanding the court's erroneous view to the contrary.*

It is no answer to say, as the court in essence did, that if the jury wanted to hear again the charge on character evidence they could ask for it. For, here, unlike United States v. Rosenberg, 195 F.2d 583, 598-599 (2d Cir.), cert.den., 344 U.S. 838 (1952), it cannot be said that "the jury understood from the colloquy that [the character evidence charge] would be read if the jurors so desired, and that their silence meant they had no such desire." For, in this case, unlike in Rosenberg, no such illuminating colloquy occurred in front of the jury, nor were they asked if they wanted that particular charge re-read. Compare, United States v. Gentile, 525 F. 2d 252, 260 (2d Cir.), cert.den., 425 U.S.903 (1976).**

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* The kind of character evidence appellant introduced, and the argument he made from it, has also been described as "circumstantial" evidence in the sense that it suggests an inference that appellant acted on the occasions in question consistently with his previously good character. See Advisory Committee's Note, Rule 404, Federal Rules of Evidence (Federal Judicial Center, 1975), p. 26. Under this theory, the court also could properly have re-instructed the jury on character evidence when it re-charged at length on circumstantial evidence (2405-2407).

** Although the court here issued "an invitation" to the jury to send another note if the court had omitted to read back something the jury wanted to hear (2398), such an "invitation" cannot be compared with the more direct kind of questioning that took place in Rosenberg and Gentile.

In short, either of the jury's two requests(Ct.Xs6 and 7)* were sufficient by their own terms to require the court, pursuant to appellant's timely requests, to recharge on character evidence, and the court erred in refusing to do so.

Even assuming arguendo, however, that the jury's two questions by their own terms did not necessitate a charge on character evidence, such a charge was still required to preserve a semblance of balance after the court re-charged on a plethora of prosecution-oriented matters.

The Fifth Circuit, at least, requires that

> When the jury requests further instructions on points which are favorable to the Government, the trial judge should repeat instructions favorable to the defense where the requested instructions taken alone might leave an erroneous impression in the minds of the jury.

United States v. Carter,491 F.2d 625,634(5th Cir.1974); see also, Bland v. United States,299 F.2d 105,108(5th Cir.1962); Perez v. United States,297 F.2d 12,16-17(5th Cir.1961).

The trial court here created precisely the imbalance that the Fifth Circuit rule was designed to prevent. By having read back to the jury, over a defense objection,** perhaps the most damaging of

* While the foregoing discussion has focused primarily on the first of the jury's requests(Ct.X6) their next request as to whether "very good intent and purpose mean/t/ that this individual has no criminal intent when he or she lied to a government agency" (Ct.X 7), also called for a charge on character evidence. Inextricably woven into the question of whether "very good intent and purpose" negated intent was the question of whether such a person had the kind of character that made it improbable he had acted with criminal intent. Under either question, then, appellant was entitled to have the jury re-charged on the effect they might give character evidence.

** Defense counsel did not simply request the charge on character evidence; he also objected to the court's re-charge on false exculpatory statements, consciousness of guilt, similar acts evidence, and the "purpose of section 1001"(Government's Requests to Charge #10)(2394,2417) on the ground that they "unduly tend to emphasize a portion of the case"(2394) and resulted in an unbalanced charge (2417).

the charges requested by the government and the facts applicable to those charges -- e.g., appellant's false exculpatory statements before the Department of Investigation concerning his relationship with his sister, appellant's statement to his cousin Watson that he"did not have to remember certain matters" in testifying before the grand jury as reflecting consciousness of guilt, appellant's attempt to disguise his handwriting examplars as also reflecting consciousness of guilt, the "similar acts" evidence of appellant's A.S.A. rent scheme for the building at 161 East 121st. Street, and the charge on the purpose of 18 U.S.C. §1001 which concluded with the words, "The law recognizes no excuses or justification for a false...statement wilfully and intentionally made" -- the court literally swamped in a wave of charges favorable to the prosecution appellant's only defense that he lacked criminal intent as demonstrated in part by the testimony of his previous good character and reputation.*

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* The court here even failed to resort to the easy expedient of cautioning the jury not to place more emphasis on its additional instructions, not to single out one instruction as stating the law, and to consider all instructions as a whole. United States v. Mixon, 374 F. 2d 20,23 (6th Cir. 1967). While such an instruction may not have cured the error in refusing to charge on character evidence, it might have lessened the prejudice.

In this posture, it cannot be seriously maintained that the court's single, favorable remark in its original charge on the effect of character testimony -- that it "may in itself create a reasonable doubt where without such evidence no reasonable doubt would have existed" -- was still in the minds of the jury, particularly since it was made the day before and after more than nine hours of jury deliberation.* Bland v. United States, supra, 299 F.2d at 109. If the jury needed further instructions on the elements of §1001 and that part of the charge relating to intent, "it is an inference so strong as to be conclusive, that the further instructions, explaining /the significance of character testimony_7, had also by then completely gotten out of the minds of the jurors." Ibid. In short, appellant was "effectively stripped of /_his_7 sole defense and conviction became a foregone conclusion." Ibid.

Accordingly, under the Fifth Circuit rule of Carter, Bland, and Perez, the trial court here erred in not also re-charging on character evidence pursuant to the defense request when its supplemental charge so clearly favored the government.

However, even if this Court refuses to follow the salutary Fifth Circuit rule, the trial court's refusal here to re-charge on character evidence would still have been improper as an abuse of discretion. For it created a needlessly prejudicial imbalance in the legal framework within which the jury was to determine appellant's guilt or innocence.

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* The jury returned to the courtroom to hear the answer to their second question (Ct.X7) at 3:25 P.M. on October 20th (2421), twelve hours after beginning deliberations.

This precise problem has been addressed in the A.B.A.'s Standards, §5.3(b),* which provides:

> The court need not give additional instructions [on any point of law] beyond those specifically requested by the jury, but in its discretion the court may also give or repeat other instructions to avoid giving undue prominence to the requested instructions (emphasis added).

Relying on the almost identical provision of the A.B.A.'s Standards, §5.2(b), this Court in Gentile upheld as a proper exercise of discretion the trial court's decision to have replayed to the jury a tape recording which the jury had apparently not requested to hear, although they had requested to hear others which the court played back as well. This Court did so apparently on the theory that the playing back of the unrequested tape aided the jury in understanding the other tapes they had requested. At the same time, this Court cautioned that reversal for submitting to the jury unrequested material might arise "when it leads to a biasing of the record." Id. at 261.

Gentile demonstrates that the trial court here undoubtedly had the discretion to submit again its charge on character evidence even though the jury may not have specially requested it. Cf. United States v. McCarthy, 473 F.2d 300,308(2d Cir.1972). Gentile is also authority by analogy for the proposition that when, as here, the court refuses to exercise that discretion, reversal may be required when the refusal to submit the unrequested matter "leads to a biasing of the record."

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* Since this Court has cited with approval identical A.B.A.'s Standards, §5.2(b), which relates to the Court's obligation when a jury has requested further instruction on a point of evidence [United States v. Gentile, supra, 515 F.2d at 260], it seems clear that this Court would, at a minimum, adopt the identical requirements of §5.3(b) relating to the jury's request for instruction on a point of law.

In this case, it cannot be seriously doubted that the court's refusal to re-charge on character evidence, after it had charged on so many other points favorable to the government, created a severe imbalance against appellant and therefore a "biasing" of the record. "In the interest of fairness and completeness" /United States v. McCarthy, supra 7 appellant was entitled to that charge pursuant to his request, and the trial court abused its discretion in refusing to give it.

Whether it is considered an error of law or an abuse of discretion, the court's improper refusal to charge again on character evidence seriously prejudiced appellant's right to a fair trial. His defense substantially revolved around his previous good character and reputation as it affected the question of criminal intent. By refusing to submit again the requested charge, the court effectively deprived appellant of the linchpin of his defense. Moreover, the length and nature of the jury's deliberations demonstrated that they found the government's case far from overwhelming. The jury not only required a day and a half to reach a verdict on the concededly uncomplicated counts 1-19,* but returned with at least eight separate requests for further instructions or evidence during their deliberations, and even then could not reach agreement on counts 20-38. Finally, while the record does not expressly show it, it seems likely that the jury reached its verdict on counts 1-19 sometime within three hours of the court's recharge on the second of the jury's contested requests at approximately 3:30 P.M. on October 20th(2421). For, at 6:35 P.M., the jury sent another note requesting evidence

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* In responding to defense counsel's request for a one week continuance at the beginning of trial, the prosecutor claimed that counts 1-19 were based on "a very simple theory and...not very complicated"(12)

directed at counts 20-36(2431), indicating that the jury's focus had shifted from counts 1-19.

Thus, it cannot be said with "fair assurance" that "after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error..." United States v. McCarthy, supra, 473 F.2d at 308; Kotteakos v. United States,328 U.S.750,765(1946). Accordingly, appellant's conviction must be reversed and a new trial ordered.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING INTO EVIDENCE, OVER OBJECTION, GOVERNMENT EXHIBIT 56 WHEN THERE WAS AN INSUFFICIENT FOUNDATION TO BELIEVE THAT APPELLANT HAD EVER RECEIVED OR SEEN THE DOCUMENT

Over objection, the court admitted in evidence a letter from the director of CJCC addressed to a government witness, Oostdyke, directing him, among other things, to comply with all City and State regulations relating to the administration of the Legal Pro grant (511,GX56,App."D"). The court did so based on its finding that "there is a sufficient foundation for the Court to conclude that the letter was in fact turned over to Mr. Thweatt" (478, emphasis added). Oostdyke, however, not only had no recollection of receiving the letter or of showing or giving it to appellant (factors which initially led the court to sustain the objection)(468-471), but he also admitted giving such documents to anyone of three other persons, beside appellant, associated with Legal Pro (473-474). The court nonetheless finally overruled the objection because, in its view, Oostdyke's "habit and practice" during this period (May, 1972) was to receive unopened any mail addressed to him, and to turn over any Legal Pro correspondance either directly to appellant or to other persons

associated with Legal Pro with the direction to pass it on to appellant (478). This evidentiary foundation was insufficient since there was no attempt by the government to demonstrate, despite an opportunity to do so, that the "habit and practice" of those other whom Oostdyke gave Legal Pro mail included turning it over to appellant pursuant to Oostdyke's direction. Thus, there can be no assurance that a concededly important piece of evidence, which the government not only read to the jury (522) but relied on in its summation, was "in fact" received or known of by appellant. The document was therefore inadmissible, and the court committed reversible error in ruling otherwise.

It cannot be doubted that if appellant never received, saw, or was aware of the contents of GX56, that document would have been irrelevant to the issue of appellant's knowledge of the reporting requirements to which he was subject, and therefore inadmissible.* Rules 401-402,F.R.Ev.; Gila Valley, Globe & Northern Railway Co. v. Hall, 232 U.S.94,102-103(1914); Advisory Committee's Note, Rule 104(b), F.R.Ev., as quoted in I Weinstein and Berger, EVIDENCE, p. 104-7. Thus, the relevance, and therefore admissibility, of GX56 was conditioned on the fact of appellant's receipt of it. Rule 104(b),F.R.Ev., which governs this situation, provides as follows:

> When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of

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* That the government introduced Ex.56 for this purpose is demonstrated not only by its failure to dispute defense counsel's contention that the government would later argue to the jury, based on Ex.56, that appellant "obviously knew each and every practice that had to be followed,"(480) but also by the fact that in summation the government made precisely that argument: "...there is Government Exhibit 56 which is a letter that Mr. Oostdyke testified that he probably handed over to Mr. Thweatt which letter specifically says follow various regulations." (2255)

evidence sufficient to support a finding of the fulfillment of the condition (emphasis added).

Here, there was simply insufficient evidence "to support a finding of the fulfillment of the condition."

While Oostdyke's "habit and practice" [Rule 406,F.R.Ev.] of giving Legal Pro correspondance directly to appellant, or to one of three others with the direction to give it to appellant, may have carried the government part of the way in establishing the necessary factual "condition" for the document's admissibility, it was necessary for the government to establish in addition that those three other persons -- Sidney Mann, Gladys Battle, or Carl Hart -- either remembered giving the document to appellant or had a habit and practice of following Oostdyke's request to do so. In the absence of such testimony, there was no way of knowing whether anyone of those three, if he did receive the document from Oostdyke, discarded or kept it to himself instead of tranmitting it to appellant.*

Moreover, the government had ample opportunity to close substantially that gap in the evidentiary foundation, but failed to do so. Two of the three people to whom Oostdyke testified he routinely gave Legal Pro correspondance were called as witnesses at the trial --Carl Hart by the government and Sidney Mann by the defense. Yet, the prosecutor failed to ask either one whether he recognized GX56 and gave it to appellant, or whether it was his practice to give such correspondance to appellant.

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* Since, as Oostdyke testified, Sidney Mann was the director of Legal Pro during the period the letter was sent in May, 1972(419), Mann at least may well have considered himself something more than a mere conduit for appellant's Legal Pro correspondance and may just as easily have retained GX56 himself, if Oostdyke had given it to him.

Nor was it permissible to place the burden on appellant of waiving his Fifth Amendment privilege and forcing him to testify that he did not receive the letter, as the court in essence did.* For the inference that appellant received the document from the fact that it was sent to Oostdyke is not so compelling or "deeply rooted in our law" as to justify placing on appellant such a duty to produce evidence to rebut it. Compare, Barnes v. United States, 412 U.S.837,843,846-847 (1973); Turner v. United States, 356 U.S. 398,417-418 (1970). While the person who could best rebut the inference was no doubt appellant himself, it would have been unfair, as counsel argued, to place appellant "in the position of waiving his Fifth Amendment rights in order to rebutt [sic] one piece of evidence" (480). Indeed, counsel even offered to have appellant testify at a hearing limited to the issue of whether he received the document (480), and that suggestion should have been more than adequate to fulfill any obligation to rebut that appellant may otherwise have had.

Finally, the admission of GX56 cannot be deemed to have been harmless error. The issue of appellant's knowledge of the reporting requirements of the grant award was central to both the government's case and appellant's defense on all the counts of the indictment. Exhibit 56 provided important corroborative proof that appellant had the required knowledge when otherwise there was little else the

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* The court stated, "Of course, this is subject to rebuttal in the event at some later stage of the proceedings the defendant chooses to produce some evidence of one kind or another that the letter was not in fact received" (478).

government could rely on to affirmatively establish that fact.* That the defense viewed GX56 as important is demonstrated by the lengths to which it went in summation in order to discount it (2282-2284). Indeed, the trial court itself viewed the document as a significant piece of evidence. In replying to counsel's argument against admission that "it is clear this letter goes to the issues that are directly involved in this particular trial --," the court responded, "That is why I am being so careful regarding its admissibility" (479). Despite the court's conceded caution in admitting Exhibit 56, including initially sustaining a defense objection to it, allowing the defense to conduct several voir dires on the matter, and delaying its ruling on admissibility until after the defense had completed Oostdyke's cross-examination (482), the court nonetheless reached the wrong conclusion in permitting it in evidence.

In sum, as counsel argued below, "considering the possible importance [of exhibit 56],...[it] would lead me to believe that the Court would want stronger evidence to show that a person had actually received it" (480). The court's failure to demand such an

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* The only other affirmative proof the government introduced to establish appellant's knowledge of the reporting and bookkeeping requirements of the grant to which he was subject was the testimony of Rudolph Clarence, the chief fiscal officer at CJCC, who described his no more than two hour conversation with appellant, occurring five and a half years earlier, during which Clarence claimed to have given appellant the proper instructions. Clarence, himself, however, admitted that his explanation to appellant of the terms and conditions of the grant award was either "superficial" or non-existent (246). Moreover, since it was Clarence who had the duty to oversee the propriety of Legal Pro's reports, he had an interest in portraying himself as fulfilling his responsibility to explain the requirements of the program to appellant, particularly in view of his admitted "goof" in approving Legal Pro's reported rent expenditure of $800 a month (254). Whether or not Clarence's testimony was sufficient in itself to support the government's duty to prove appellant's knowledge of the reporting requirements, it was a slender reed indeed without the corroborative proof of GX56.

evidentiary foundation created reversible error, particularly when viewed in conjunction with the error discussed in POINT I, supra.

POINT III

THE IMPOSITION OF A MORE SEVERE SENTENCE BECAUSE APPELLANT FAILED TO DEMONSTRATE "CONTRITION" FOR CRIMES OF WHICH HE MAINTAINED HIS INNOCENCE IMPERMISSIBLY PLACED A PRICE TAG ON HIS FIFTH AMENDMENT PRIVILEGE NOT TO INCRIMINATE HIMSELF, REQUIRING HIS SENTENCE TO BE VACATED AS A MATTER OF DUE PROCESS OR IN THE EXERCISE OF THIS COURT'S SUPERVISORY POWER

Despite the fact that appellant had maintained his innocence through trial and still had appellate review available to him, the court demanded in effect that he confess guilt prior to the imposition of sentence by demonstrating "contrition" for the crimes of which the jury had convicted him. Upon determining that appellant showed "a lack of contrition," the court left no doubt that it "accordingly" imposed a more severe sentence than it otherwise would have. In placing the price tag of a higher sentence upon appellant's exercise of his privilege not to incriminate himself, at least while appellate review was still available, the court acted impermissibly. Consequently, either as a matter of due process or in the exercise of this Court's supervisory jurisdiction, appellant should be resentenced before a different judge.*

The Fifth Amendment guarantees that no one shall be compelled to be a witness against himself in any criminal case. United States Constitution, 5th Amend. While it may not be an entirely settled

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* This issue does not involve a question of sentencing discretion, which would normally be unreviewable on appeal/ Gore v. United States, 357 U.S.386,393 (1958)_/, but rather a legal question as to the factors that a federal court may permissibly consider in imposing sentence. Such a question may of course be reviewed on appeal. United States v. Hendrix,505 F.2d 1233(2d Cir.) cert.denied 423 U.S. 897 (1975).

question whether the privilege survives a jury's guilty verdict when a defendant has not yet been sentenced and exhausted appellate review, the majority of federal courts which have addressed the issue has found that it does. Scott v. United States,419 F.2d 264,267-268 (D.C.Cir.1969)(Bazelon,D.J.); Thomas v. United States, 368 F.2d 941,945-946(5th Cir.1966); Frank v. United States, 347 F.2d 486,491 (D.C.Cir.), cert. dismissed, 382 U.S.923(1965); Mills v. United States, 281 F. 2d 736,741(4th Cir.1960); cf. United States v. Ottomano, 468 F. 2d 269,273-274 (1st Cir.), cert. denied, 409 U.S. 1128 (1973); See generally, McCormick, EVIDENCE,§121,p.257 (2d ed.1972); but see, Gollaher v. United States, 419 F. 2d 520,529-531 (9th Cir.), cert. denied, 396 U.S. 960(1969).

Indeed, in United States v. Wilson, 488 F. 2d 1231,1233,fn. 3(2d Cir.) rev'd on other grounds, 421 U.S. 309(1975), this Court approvingly cited Professor McCormick's Treatise for the proposition that "at least when there has been a conviction after trial rather than after a guilty plea -- the privilege continues not only until after sentencing but also until after the time for appeal as of right has expired."

Nor is it difficult to perceive the reasons for keeping the privilege alive, at least until appellate review has been exhausted. Not only would a premature acknowledgment of guilt prejudice a defendant upon re-trial if he were successful in securing one on appeal [cf. United States v. Ottomano, supra], but it might just as easily prejudice the appeal itself, or so a defendant could reasonably believe. Scott v. United States, supra, 419 F.2d at 268 ("But the appellant could reasonably have believed that he could show penitence -- real or affected -- only at the price of prejudicing

his appeal, if not worse."). This latter prejudice is particularly significant since a defendant may have been entitled to an acquittal, either directed by the court or found by the jury, and notwithstanding a guilty verdict, expected to be vindicated on appeal. A compelled acknowledgment of guilt at sentencing, however, certainly could not help his chances for vindication and, if anything, might lessen them.*

In short, reason and the weight of authority dictate the conclusion that, when appellant appeared for sentencing after the jury convicted him, he still retained his Fifth Amendment privilege not to incriminate himself.

That appellant was aware of that privilege and consciously refused to waive it cannot be seriously questioned. Indeed, he apparently said as much to the Probation Department prior to his sentence, for the Pre-Sentence Report states that "[i]nasmuch as the defendant intends to appeal his conviction, he, upon the advice of counsel, has elected not to make any formal references to the material facts in this case."

Moreover, during his allocution, appellant studiously avoided

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* There is yet the further possibility, seemingly not present in this case, of a defendant who is forced to incriminate himself before sentence prejudicing himself even as to his sentence. Mills v. United States, supra, 281 F.2d at 741. Indeed, this Court in Wilson, supra, recognized the possibility of this kind of prejudice by suggesting that a convicted but not yet sentenced defendant, called to testify under a grant of immunity at a co-defendant's trial before the same judge, could have "requested a different judge for sentencing." 488 F. 2d at 1233. While this possibility of prejudice did not exist here since the trial court made it clear that a demonstration of contrition, i.e., an acknowledgment of guilt, could only help, not hurt, appellant, the possibility of this prejudice arising in another case is additional support for our contention that the Fifth Amendment privilege survives a guilty verdict at least until sentence is imposed and appellate review exhausted.

any admission of guilt. On the contrary, he in effect continued to assert his innocence, telling the court variously that "I have never acted in an unauthorized fashion no matter whom I was working for..."(S.12); "I have paid a dear, dear price for maybe an error in judgment" (S.13); and "I emphasize I would never intentionally go about trying to break the law and I have not in the past and I won't in the future"(S.14). Indeed, the prosecutor himself recognized appellant's effort to avoid a confession of guilt, for, in commenting on a letter appellant had submitted to the court which was in a similar vein, the prosecutor argued that "it is a total failure of Mr. Thweatt to own up to his own wrongdoing" (S.18).

Just as it cannot be doubted that appellant consciously refused to waive his Fifth Amendment privilege, neither can there by any serious question that he paid the judicially imposed price of a higher sentence for refusing to do so. Before imposing sentence, the court remarked:

> It is clear to me from the evidence presented at trial that the defendant's guilt was proved beyond a reasonable doubt. After that occurred, he had a choice. He could accept the verdict of the jury and the evidence which had supported it, or he could reject it.
>
> He chose to reject it. I do not criticize him for his choice but I say that it indicates a lack of contrition and requires the Court, in this Court's view, to sentence him accordingly.
>
> The Court has determined that a period of confinement is required (S.25,emphasis added).*

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* The juxtaposition of the court's conclusion that"a period of confinement is required," coming as it did immediately after the court's conclusion that appellant's failure to show contrition "requires the Court...to sentence him accordingly," suggests the possibility that the court might otherwise have sentenced appellant to probation of only he had been contrite. This possibility gains support from the fact that defense counsel had urged the court to impose a sentence of probation (S.10).

In view of these statements by the court, there can be little doubt that the concurrent two year terms of imprisonment imposed on appellant, although not the maximum punishment appellant might have received, was nevertheless a more severe sentence than appellant would have received had he not continued to assert his innocence and instead demonstrated "contrition" by an admission of wrongdoing. As the court said in Poteet v. Fauver, 517 F.2d 393,396 (3rd. Cir.1975), a similar case:

> The question is whether the judge increased the sentence in the absence of a confession. We think the fair inference from the judge's lecture to [appellant] is that if [appellant] had admitted his guilt, the court would have lightened the sentence.

The question thus becomes whether a judge may impose a more severe sentence because of a defendant's refusal to waive his Fifth Amendment privilege and admit guilt through a demonstration of contrition. While this question does not appear to have been definitively answered in this Circuit, the weight of authority again demonstrates that a judge may not do so. Se, e.g. Poteet v. Fauver supra; United States v. Rogers, 504 F.2d 1079 (5th Cir. 1974); Scott v. United States, supra; Thomas v. United States, supra; but see, Gollaher v. United States, supra.

For example, in Thomas, the defendant continued to maintain his innocence after the trial court advised him prior to sentencing that if he "came clean" and admitted his guilt the court would take that into account on sentence, and would also take into account on sentence his refusal to do so. In a proceeding brought pursuant to 28 U.S.C. § 2255, the Fifth Circuit vacated the sentence under its supervisory power because "[w]hen Thomas received harsher punishment than the court would have decreed had he waived his Fifth Amendment rights, he paid a judicially imposed penalty for exercising

his constitutionally guaranteed rights." 368 F.2d at 946.

Similarly, in Scott, where the court sought an admission of guilt at sentencing as a sign of repentance from a defendant convicted after trial, the D.C. Circuit, per Chief Judge Bazelon, ordered resentencing:

> The trial judge was eager for an acknowledgment of guilt presumably because a confession might indicate repentance. But the appellant could reasonably have believed that he could show penitence - real or affected - only at the price of prejudicing his appeal, if not worse. Whether the trial judge intended or not "to bargain thus with the defendant," we conclude that "the court was without right...to put a price on an appeal." 419 F.2d at 268.

See also, Poteet v. Fauver, supra, where the Third Circuit, in a case raising the same issue, granted a state prisoner's writ of habeas corpus and ordered resentencing as a matter of due process.

Moreover, this Court itself has demonstrated that it has no quarrel with the decisions in Thomas and Scott as they apply to the issue here. In United States v. Vermeulen, 436 F.2d 72,76(2d Cir.), cert. denied, 402 U.S.911(1971), this Court carefully distinguished the situation in Thomas and Scott from that of Vermeulen who received a higher sentence because he refused to co-operate with law enforcement officials concerning the criminal conduct of others. While this Court found that the sentencing judge had not imposed a "price tag" on Vermeulen's Fifth Amendment privilege, it clearly implied that the sentencing courts in Scott and Thomas had impermissibly done so:

> Scott and Thomas...are distinguishable in that they both involved clear-cut attempts by sentencing courts to induce defendants who pleaded not guilty to confess their guilt of the crimes charged as a sign of repentance before sentence was announced. Ibid.*

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* The Vermeulen distinction can perhaps be further justified by acknowledging that even though some infringement on a convicted
(fn.cont'd next page)

See also, United States v. Hendrix, supra, 505 F. 2d at 1235-1236, where this Court again demonstrated acceptance of Scott's reasoning and holding on the question presented here; but see, United States v. Floyd, 496 F. 2d 982, 989 (2d Cir.), cert.denied, 419 U.S. 1069 (1974).

Here, there can be no doubt that appellant was punished "accordingly" for refusing to waive his constitutional right not to incriminate himself before exhausting his appeals. As the Supreme Court has recently reaffirmed,

> To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort. Bordenkircher v. Hayes, ____ U.S. _____, 46 U.S.L.W.4089, 4091 (decided January 18, 1978).

And while the appearance of such punishment may be the "inevitable" by-product of a system which "tolerates" the negotiation of guilty pleas [Ibid.], there is no reason to tolerate the appearance or the fact of such increased punishment in a situation like appellant's, where there can be no legitimate interest in discouraging or prejudicing the right to appeal or the right to re-trial afterwards.

Accordingly, appellant's sentence should be vacated either as a

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defendant's Fifth Amendment privilege arises when he is forced to incriminate others on pain of a higher sentence if he refuses to do so [United States v. Rogers, supra, 504 F.2d at 1085], nevertheless, that modest amount of infringement is outweighed by a compelling state interest in securing evidence of on-going criminal actions of others. Cf. Scott v. United States, supra, 419 F 2d. at 270; Sherbert v. Verner, 374 U.S. 398, 406(1963). Here, however, where a defendant is being asked to incriminate only himself and where the criminal conduct has presumably terminated with his conviction, there is no compelling state interest that he admit guilt through a show of contrition sufficient to outweigh his Fifth Amendment privilege. This is particularly so in view of the dubious benefit to society, to defendant, or to anyone else, in having the defendant utter a mea culpa. Scott v. United States, supra, 419 F. 2d at 269-271.

violation of due process [Bordenkircher v. Hayes, supra; Poteet v. Fauver, supra] or in the exercise of this Court's supervisory power [Scott v. United States, supra; Thomas v. United States, supra] and the case remanded for re-sentencing before a different judge. United States v. Robin, 553 F.2d 8 (2d Cir.1977); cf. Poteet v. Fauver, supra, 517 F.2d at 398.*

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* It is submitted that this case presents one of those "instances" recognized by this Court in Robin where "both for the judge's sake and the appearance of justice, an assignment to a different judge 'is salutory and in the public interest, especially as it minimizes even a suspicion of partiality.'" United States v. Robin, supra, 553 F.2d at 10 (citations omitted). While the admittedly detailed factual record involved in the trial here might militate against a re-assignment for re-sentencing, the difficulty the first judge would have in erasing from his mind the improper consideration that appellant had not initially shown "contrition," coupled with"the appearance of justice," [Ibid.] should tip the balance in favor of doing so, particularly since the government and defense counsel are fully capable of apprising a new judge of the relevant facts with full sentencing memoranda, as the government did at appellant's original sentencing.

POINT IV

THE FALSE DOCUMENTS APPELLANT WAS CONVICTED OF HAVING FILED WITH CJCC WERE NOT MADE IN A MATTER WITHIN THE JURISDICTION OF A FEDERAL AGENCY WITHIN THE MEANING OF 18 U.S.C. §1001

Appellant was convicted under a statute which requires the government to prove beyond a reasonable doubt that false statements were made in a "matter within the jurisdiction of any department or agency of the United States." 18 U.S.C.§1001; United States v. McCue, 301 F.2d 452,454(2d Cir.),cert.den. 370 U.S.939(1962). The documents appellant filed with CJCC pertaining to Legal Pro's rent were not made in a "matter within the jurisdiction" of LEAA because the purpose of the legislation creating LEAA was to prevent the kind of federal usurpation of local law enforcement functions which took place here, and because the evidence at trial failed to demonstrate that the documents involved were anything but state or locally required. In short, the nature of LEAA and its method of operation in this case made the documents filed by appellant "an offense of a different kind" [United States v. Brecht,540 F. 2d 45,48(2d Cir.1976)] than one punishable under §1001.* Assuming arguendo that appellant committed any offense at all, it should have been prosecuted by state authorities, particularly since the prosecutor himself conceded at trial that the state and local funding agencies were "to

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* As far as counsel's research discloses, there is no other reported case of a prosecution under §1001 involving LEAA, despite that agency's ten year existence. That fact may indicate a prosecutional interpretation that the kind of local offenses involved here are better left to local prosecution. Cf. United States v. D'Amato, 507 F. 2d 26, 27 (2d Cir. 1974).

some extent the victims of Mr. Thweatt's failure to report accurately" (341).*

Admittedly, the scope of §1001's jurisdictional element has a broad sweep /United States v. Gilliland, 312 U.S.86,93(1941); United States v. Adler,380 F.2d 917,922(2d Cir.), cert.den.389 U.S. 1006(1967)_7, but it also has its limits. United States v. D'Amato, supra. Indeed, courts have recognized "the concern which has been expressed with regard to the possible over-extension of §1001." United States v. Isaacs, 493 F.2d 1124,1157(7th Cir.),cert.den.,417 U.S.476(1974). Moreover, while §1001 does not require that the false documents actually be filed with, or come into the possesstion of, the federal agency /United States v. Candella, 487 F.2d.1223 (2d Cir.), cert.den.,415 U.S.977(1974)_7, as in fact they did not here, it does require the existence of a significant and active involvement by the federal agency beyond the mere disbursement of federal funds. Lowe v. United States, 141 F.2d 1005(5th Cir.1944); compare, United States v. Candella, supra,487 F.2d at 1226-1227.

It was this very involvement with the local agencies that Congress sought to eschew in enacting the controversial Omnibus Crime Control and Safe Streets Act of 1968 by which LEAA was created. P.L. 90-351, Title I, June 19, 1968, 42 U.S.C.§§3701 et seq. A number of the Act's Congressional proponents, recognizing the danger of LEAA's intrusion into areas of traditionally local law enforcement, indicated their view that LEAA should play the most minimal role in the programs that the states established with LEAA funds. Thus, for example,

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* New York Penal Law §175.35 punishes conduct similar to that for which appellant was prosecuted under §1001.

Senator Fong was of the view that

> [t]his basic princi of the responsibility of State and local governments for law enforcement in the United States is firmly maintained in Title I of the bill. The law enforcement assistance programs authorized by the title will remain under the direction and control of State and local enforcement agencies. 1968 U.S. Cong.& Adm.News, p.2239(emphasis added)

See also, the remarks of Senators Eastland, Dirksen, Hruska, Scott, and Thurmond, 1968 U.S. Cong.& Adm. News, pp.2270-2273,2276-80.

Moreover, the statute that was finally enacted reflected this concern. Thus, Congress' finding was that "crime is essentially a local problem that must be dealt with by State and local governments if it is to be controlled effectively." 42 U.S.C.§3701. And it was Congress' expressed policy in creating LEAA "to assist State and local governments in strengthening and improving law enforcement and criminal justice at every level by Federal assistance." 42 U.S.C. §3701. Finally, the Act itself expressly prohibits "any department, agency, officer, or employee of the United States [from exercising] any direction, supervision, or control over any police force or any other law enforcement agency of any State or political subdivision thereof." 42 U.S.C.§3766(a).

In view of the expressed Congressional concern that LEAA not lead to "an Orwellian 'federal police force'" [Ely v. Velde, 451 F.2d 1130,1136(4th Cir.1971)], it is not surprising that LEAA itself has adopted a "hands off" approach to federal financial assistance to the states, and has taken the position that its own role should be "as small...as possible in the individual states' spending of allotted funds." Id. at 1135.*

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Thus, because it touches so directly on "tne sensitive relation between federal and state criminal jurisdiction" [United States v. Bass, 404 U.S. 336, 349 (1971)], LEAA is simply different, and views itself as such, from otner federal agencies wnose legitimate functions §1001 was designed to protect from perversion. Accordingly, it would defeat the purposes for which LEAA was established to permit the government to prosecute, under tne guise of §1001, the kind of local offense which was claimed to have been committed here when local law enforcement officials were perfectly capable of doing so.**

Furthermore, the evidence at trial failed to demonstrate that the false reports appellant was convicted of filing were anything more than state or city imposed requirements designed to further their own administration of the LEAA-funded program. In Candella, supra, where a similar argument was made, this Court recognized that §1001 counts "based upon tne affidavits must fall if the affidavits were not in a matter within the jurisdiction of HUD." 487 F.2d at 1225. This Court rejected the argument in Candella and affirmed the conviction because HUD had promulgated specific regulations requiring that the

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* In Ely, LEAA argued that its interpretation ot tne statute creating it was entitled to great weight. While the court rejected that argument because of the interplay tnere of three statutes creating federal agencies charged with the administration of their respective statutes [Id. at 1135, fn. 14-7], that situation does not obtain here and LEAA's interpretation or its own limited role in Ely should be given effect in this case.

** Congress' concern over intrusive federal involvement in state law enforcement proved to be far from illusory in this case. For, not only did tne government violate the purposes of LEAA by usurping precisely those local prosecutional functions LEAA was designed to encourage, but it did so by in effect prosecuting at the same time what concededly was a purely local offense, namely, the A.S.A. rent "scheme", on the theory that it constituted "similar acts" evidence. For this reason, as well as the substantial side issue of "ASA" evidence created at trial, unavoidably confusing tne issues as well as causing delay and waste of time, this "similar acts" evidence should have been excluded under Rule 403, F.R.Ev., and the court erred in refusing the defense request to do so.

ultimate recipient of federal funds maintain appropriate records and documentation for reimbursement claims.

Here, however, a search of the Code of Federal Regulations and Federal Register fails to disclose any similar regulations promulgated by LEAA imposing reporting requirements on local projects like Legal Pro.* It appears that LEAA has left it to the States to impose whatever reporting requirements on the project level the States deem fit for the administration of LEAA-funded programs. This policy is of course consistent with LEAA's "hands off" approach to federal funding.

Nor was there anything in the documentary or testimonial evidence at trial which established that the monthly reports on rent (GX1-20), upon which appellant's conviction was based, were anything more than State and City requirements designed to further their own administrative purposes. The Grant Award and its "Attachment A" (GX 28), and the subcontract between CJCC and Hollow (GX30), which a government witness testified comprised the entire agreement by which Legal Pro's operation was bound, certainly do not indicate that the

* There does appear in the Federal Register, but not CFR, the announce- on June 18,1973, well after Legal Pro began operation, that on April 30, 1973, LEAA issued the manual "Financial Management for Planning and Action Grants." Fed.Reg., vol.38, No.116, p.15858(June 18,1973). This manual, which bears the reference number "M7100.1A," was the document that Zazzaro, LEAA's New York administrator, testified governed reporting requirements(365-366). The Manual, entitled a "Guideline Manual," sets forth nothing more than suggested reporting and accounting procedures to assure proper administration of LEAA-funded programs, and expressly provides that "[s]tates are free to follow their established financial procedures..." LEAA Guideline Manual, "Financial Management for Planning and Action Grants," Chapter 2, p.1(April 30, 1973). Thus, not only are there absent in this case the kind of specific regulations this Court found persuasive in Candella, but the mere "guidelines" that do exist here expressly leave it to the states to provide for the kind of reports appellant was convicted of filing.

monthly reports were federally required. Indeed, those documents suggest the contrary. For example, paragraph 1 of the Grant Award states that "[a]lthough the funds granted hereunder are furnished by [LEAA], the award is a grant from the State of New York." Paragraph 12 of the Grant Award, which imposes a record-keeping requirement, makes no mention that this requirement is a federal one. Paragraph 21 in fact would lead one to a contrary conclusion, for it provides that in order to receive reimbursement, "the Grantee shall comply with rules, regulations, and procedures established by the Comptroller of the State of New York." (emphasis added).* Finally, the actual monthly reports give no hint that LEAA had any interest or involvement in them. Compare, United States v. Candella, supra, 487 F. 2d at 1226. The "certification" of accuracy on those reports, which appellant was required to sign, states only that the requested reimbursements "were made in accordance with the rules and regulations of [CJCC]." The closest the government came to demonstrating a federally-imposed duty of reporting on appellant and Legal Pro was the testimony of Zazzaro, who claimed that project recipients "should" keep records (364), which of course was only consistent with what LEAA's Manual suggested. This is a far cry, however, from a duty actually imposed by LEAA.

In short, not only were the monthly reports appellant filed

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* Clarence, the CJCC fiscal officer, in fact testified that he believed the "Terms and Conditions" portion of the Grant Award from DCJS to CJCC "relate[d] more to me, meaning the City of New York" (247-248), rather than to appellant and Legal Pro. Clarence's belief was significant because it apparently explained his failure to discuss the "Terms and Conditions" of the Grant Award with appellant during their two hour interview. Thus, even assuming the Grant Award can be interpreted to suggest a federally-imposed requirement on local recipients like appellant, a matter we do not concede, it nevertheless appears that appellant was affirmatively misled to believe that such "federal" requirements that did exist did not apply to him.

never transmitted to the federal agency, but there was not even a federally-created duty to file them. Instead, those false monthly reports were at most a State requirement designed to facilitate the State's own administration of LEAA-funded programs. As such, they were not filed in a "matter within the jurisdiction" of LEAA and, therefore, within the meaning of §1001.*

Accordingly, appellant's conviction must be reversed and Counts 1-19 dismissed.

POINT V

THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING COUNSEL'S REQUEST FOR A ONE WEEK CONTINUANCE TO PREPARE A DEFENSE WHEN THE TRIAL WOULD HAVE COMMENCED WITHIN TWO MONTHS OF APPELLANT'S ARRAIGNMENT AND COUNSEL HAD BEEN RETAINED LESS THAN TWO WEEKS EARLIER

Defense counsel's first and only request for a one week continuance in the start of trial, until October 3rd, was entirely reasonable and appropriate. Not only would the trial still have started witnin two months of appellant's arraignment on August 4th,

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* Appellant does not contend that false statements made to LEAA can never be prosecuted under §1001. Congress has clearly provided to the contrary. 42 U.S.C. §3792. But that section, as it relates to this case, only applies to false statements made as to material facts "in any records required to be maintained pursuant to this chapter..." 42 U.S.C. §3792. While LEAA no doubt had the power to promulgate regulations requiring local project recipients, like appellant and Legal Pro, to maintain records pursuant to the record-keeping requirement section [42 U.S.C. §3769], LEAA failed to promulgate such regulations and, instead, left it to the States to do so. Thus, the documents appellant filed in this case were not "records required to be maintained pursuant to this chapter" [42 U.S.C. §3792], and accordingly fell outside the scope of §3792 and §1001. Moreover, there is even a question whether §3792 applies to the local project recipient rather than only to persons who submit false documents directly to LEAA. For, when Congress sought to punish persons who embezzled from LEAA Funds, they made it clear they were concerned with persons on every level. 42 U.S.C. §3791. The same clarity of purpose is not reflected in §3792.

well within the four month time limit established by the Southern District's "Plan for Prompt Disposition of Criminal Cases," §III, 5(a)(3), but the extra time would have permitted counsel no more than three weeks total in which to prepare a defense in a long and complicated proceeding. While the court normally has broad discretion in deciding such applications [United States v. Knohl, 379 F.2d 427,437 (2d Cir.1967)], that discretion can also be abused [Gavino v. MacMahon, 499 F.2d 1191,1196(2d Cir.1974)], and in this case it was.

Despite the prosecutor's attempt to minimize the complexity of the indictment, it was predictable from the outset that the trial would be anything but a simple affair. The court itself acknowledged that the 38 count indictment was "substantial" (26), and the prosecutor knew only too well what the trial would entail: twenty-four government witnesses on its direct case as well approximately 600 documentary exhibits. Thus, the defense request for an extra week to prepare for what turned out to be a three week trial was hardly an unreasonable request.

Moreover, it cannot be claimed that counsel was dilatory or lackadaisical in the way he had used his time to prepare for trial since being retained less than two weeks earlier. On the contrary, he asserted he had been working "diligently" (2) and the court recognized that he had "been engaged very diligently in preparing this case ror trial (31)."

Nor was this a case where appellant himself sought to delay trial indefinitely by repeated requests for adjournments to secure counsel. United States v. Arlen, 252 F. 2d 491 (2d Cir.1958). Instead, at the first pre-trial conference on August 22, appellant indicated that he was attempting to retain Mr. Bernstein, his ultimate trial counsel,

who was apparently away on vacation during the month of August and would not return until early September (30). Since appellant retained his attorney promptly upon the attorney's return, the delay of a month in doing so should not be held against appellant, particularly since he was indicted and arraigned in late summer when it was only reasonable to expect that counsel of his choice would be away on vacation.

In short, neither appellant nor his counsel was responsible for any delay or waste of time, and the court did not attempt to assign such blame in denying the request for the continuance.

While recognizing the validity of counsel's argument that appellant's "whole life is tied up in this particular indictment" (24) and therefore he should be given adequate time to prepare a defense, the court nevertheless appeared to deny the application under the reluctant constraint of the Speedy Trial Act, 18 U.S.C.§§3161-74, and the Southern District's "Plan for Achieving Prompt Disposition of Criminal Cases." The court stated,

> Unfortunately, in passing the Speedy Trial Act, Congress did not distinguish between one type of case and another and, in setting up our own program for the prompt disposition of criminal cases, in the pilot stage, of course, the Court has followed the same pattern (24-25).

This Court has indicated, however, that at least its own speedy trial rules, and presumably the Southern District's,

> Were intended to promote disposition of criminal charges with "reasonable dispatch," uninhibited by delays "for which there is no good reason." They were never designed to permit a district court to ride roughshod over the right of a defendant to prepare for trial. Gavino v. MacMahon, supra, 499 F.2d at 1196 (original emphasis)

Here, the meager delay of only one week that counsel requested would have been for a very "good reason." The reasons included the need to review in depth the monthly reports upon which appellant's conviction ultimately rested; the need to interview five important

witnesses, three of whom resided out of state [Gavino v. MacMahon, supra, 7; the need to consult handwriting and accounting experts to rebut the government's witnesses; and, generally, the need to explore further "numerous avenues available to the defense and numerous factual matters...in order to properly prepare for trial in this case" (2-4).

Significantly, while the prosecutor attempted to minimize or qualify the reasons given by counsel, he never expressly opposed the request for the continuance. Nor did the prosecutor or the court suggest that any prejudice would flow from granting the defense request.

Finally, a significant degree of prejudice must be assumed in a trial of such length and complexity where defense counsel was accorded such a brief period of time to prepare, particularly since he had not had time to interview such potentially important witnesses as Bert Hoff, who resided out of state.

In sum, as counsel stated below, "the government [had 7 three whole years to prepare this case and I can't understand why the defense can't have three weeks" (19). In failing to grant counsel one more week to prepare, the trial court abused its discretion.

CONCLUSION

FOR THE REASONS STATED IN POINTS I, II, IV, AND V, APPELLANT'S CONVICTION SHOULD BE REVERSED AND COUNTS 1-19 OF THE INDICTMENT DISMISSED OR A NEW TRIAL ORDERED; ALTERNATIVELY, FOR THE REASONS STATED IN POINT III, APPELLANT'S SENTENCE SHOULD BE VACATED AND THE CASE REMANDED FOR RESENTENCING.

Respectfully submitted,

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February 10, 1978

CERTIFICATION OF SERVICE

Richard A. Greenberg, Esq., an attorney admitted to the bar of this Court, hereby certifies that he served the within Brief for Appellant upon the United States Attorney for the Southern District of New York by personally delivering true copies of same to his offices at 1 St. Andrew's Plaza, New York, New York, on February 10, 1978.

Richard A. Greenberg

RICHARD A. GREENBERG